No. 84-1600 (2)

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IN THE

Supreme Court of the United States

October Term, 1984

BASHEER HAMEED (f/k/a James Dixon York)
and ABDUL MAJID (f/k/a Anthony LaBorde),

Petitioners,

against

W. CLINTON JONES, Superintendent of Great Meadow Correctional Facility, and EUGENE LEFEVRE, Superintendent of Clinton Correctional Facility,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Was the declaration of a mistrial manifestly necessary because the jury was deadlocked?

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Statement of the Case

On June 15, 1981, petitioners were indicted for the murder of Police Officer John Scarangella and the attempted murder of Police Officer Richard Rainey. The first trial ended with the jury convicting the petitioners of attempted murder in the second degree (N.Y. Penal Law §§ 110/125.25), acquiting them of attempted murder in the first degree

(N.Y. Penal Law §§ 110/125.27) (attempted murder of a police officer), and unable to reach a verdict as to murder in the second degree (N.Y. Penal Law § 125.25).

Beginning in August, 1983 the petitioners were retried on the remaining murder charge. On October 6, 1983, the retrial terminated in a jury deadlock, and the jury was discharged (O'Brien, J.).

The propriety of the jury discharge was initially contested by motion before the trial court judge, Hon. Cornelius O'Brien, on November 7, 1983, wherein the petitioners asserted the same arguments contained in the petition before this Court. On November 21, 1983 Justice O'Brien denied the motion.

On December 1, 1983 petitioners applied to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, for an order directing the trial court to dismiss the indictment, claiming than an improper discharge of the jury subjected the petitioners to double jeopardy. On February 27, 1984 the Appellate Division denied the application in a memorandum opinion *Hameed* v. *Rotker*, 99 A.D.2d 824, 472 N.Y.S. 2d 417 (2d Dept. 1984).

On March 29, 1984 the New York Court of Appeals denied, without a written opinion, the petitioners' application for leave to appeal from the order of the Appellate Division.

On April 3, 1984 petitioners filed for a writ of *habeas corpus* in the United States District Court for the Eastern

District of New York. The District Court granted a stay of the state proceedings pending a decision on the merits. The petition was denied on April 25, 1984; however a certificate of probable cause was issued and the stay was continued pending an expeditious appeal (Platt, J.).

On November 26, 1984 the United States Court of Appeals for the Second Circuit affirmed the ruling of the District Court dismissing the petition, and on February 7, 1985 the court denied an application for rehearing.

Statement of Facts

Following a jury trial in August, 1982 in the Supreme Court of the State of New York, County of Queens, petitioners were convicted of attempted murder in the second degree (N.Y. Penal Law § 110/125.25), and acquitted of attempted murder in the first degree (N.Y. Penal Law § 110/125.27). The jury deadlocked on the charge of murder in the second degree (N.Y. Penal Law § 125.25).

A retrial commenced in July of 1983, and after a lengthy trial the jury retired to deliberate on Thursday, September 29, 1983. Deliberations continued on Friday, September 30th and Saturday October 1st with many extensive readbacks of trial testimony. There were no deliberations on Sunday, October 2nd. Deliberations resumed on Monday, October 3rd and sometime before lunch the jury announced for the first time that it was deadlocked. The court directed them to continue and the jury deliberated for the remainder of that day, and on Tuesday, October 4th, and Wednesday October 5th with many readbacks.

On Thursday, October 6th at approximately 3:15 p.m., the jury notified the court for the second time that it was deadlocked, 8 to 4, for acquittal of both defendants. The court, with the consent of the petitioners, gave the jury an *Allen* charge which concluded shortly after 4:00 p.m.

At approximately 7:00 p.m. all the attorneys were told by the court that a juror, Ms. Doe, was experiencing "emotional problems" and was unwilling to go to the dinner with the rest of the jury. The court also informed the parties that Ms. Doe requested that she be permitted to speak to her psychiatrist. After conferring with the attorneys, the court decided to permit Ms. Doe to speak with her psychiatrist while the rest of the jury went to dinner.

At this juncture the petitioners' attorney asked that Ms. Doe be excused and replaced with an alternate juror. The court refused, stating that Ms. Doe should first be allowed to speak to her doctor. Then the District Attorney requested that the judge inquire whether or not the rest of the jury wished to continue deliberations, suggesting that the other eleven might also be having emotional problems. The petitioners opposed any inquiry. The judge revealed that he had "gotten some indication that there are other jurors that are having difficulties also", and stated that he was "not intending to go much beyond tonight". Ms. Doe was allowed to speak to her psychiatrist and the rest of the jury went to dinner.

Subsequently, the court informed counsel that Ms. Doe had a conversation with her psychiatrist, after which the court had also spoken to the doctor. The doctor told the judge that Ms. Doe had a history of emotional problems and

was now on the brink of a psychotic episode and could not continue as a juror.

The court informed all the parties that it was going to declare a mistrial. Counsel for both petitioners objected and again pressed the court to substitute an alternate for Ms. Doe as provided for under New York Criminal Procedure Law § 270.35. The court responded:

> "I am talking not only about the statute, but about my discretion to discharge the jury after all of these lengthy deliberations in view of the incident that has occurred with regard to Miss Doe and *in view of all the other circumstances that I must consider* when I am going to discharge jury. I am ruling that it is now time to discharge the jury". (emphasis added)

The colloquy between the court and the petitioners' attorney, in its entirety, reveals the reasoning behind the court's decision. The jury had been deliberating for a week. They had been deadlocked since the morning of the fourth day. On the seventh day of deliberations, prompted by Ms. Doe's problems, the court noted that other jurors were having difficulties, and that under no circumstances had he intended going beyond that evening. In the court's opinion the jury had given up and was deadlocked: "What occurred, I suspect strongly, is that when they sent that note indicating they were hung, eight-four, they thought that was going to be the end of it." "I am playing Russian roulette with some other people on the jury . . ." ". . . from what I have heard, they are literally, just ready to burst out of here".

In light of the court's conclusion that there was no "likelihood of a verdict", the court reasoned that any sub-

stitution of an alternate into a jury that had been deliberating for a week and deadlocked since the fourth day would have been "utterly absurd". Therefore, the court declared a mistrial and dismissed the jury.

ARGUMENT

I.

The Federal Courts Are Bound By the State Court Determination That the Mistrial Was Granted Because the Jury Was Deadlocked.

Under 28 U.S.C. § 2254(d)(8), after a state court of compentent jurisdiction makes a determination based on the facts, in a proceeding to which petitioner for the writ and the State were parties, and that determination is evidenced by a writing, the federal court cannot overturn that finding of fact unless it determines that the conclusions are not "fairly supported" by the record. The statute places upon the petitioner the burden of establishing convincing evidence that the state court determination was erroneous. *Sumner* v. *Mata,* 449 U.S. 539, 549 (1981); *R.L. Marshall* v. *Lonberger,* 103 S. Ct. 843 (1983). In addition this Court has further held that the factual determination referred to in § 2254(d) can be made by an appellate court, as well as by a trial court. *Sumner* v. *Mata, supra,* at 546.

In the instant case the Appellate Division of the Supreme Court of the State of New York, Second Department, reviewed the record of the circumstances surrounding the mistrial and determined that:

> "Because the jury had been deliberating for seven days and had twice declared itself deadlocked (first on the

> fourth day of deliberations and again on the seventh day of deliberations) the court could have concluded that agreement on verdict was unlikely within a reasonable time and thus properly declared a mistrial in accordance with CPR 310.60" (A 8).*

The Appellate Division thus found that the trial court's decision to declare the mistrial was rooted in the determination that the jury was deadlocked and was not founded on the incapacity of a juror. This finding of fact binds this Court because it is fairly supported by the entirety of the record.

The petitioners correctly point out that a trial court's exercise of discretion in determining the existence of manifest necessity "to declare a mistrial is a question of law or at most a mixed question of law and fact and therefore is not exempt from federal *habeas corpus* review. *Brady* v. *Samaha,* 667 F.2d 224 (1st Cir. 1981); *United States ex rel. Russo* v. *Superior Court of New Jersey,* 483 F.2d 7, 15 (3d Cir. 1973). However, the threshold question of whether the judge declared a mistrial because of a jury deadlock or because of the illness of a juror is a question of fact. In a recent decision this Court has held that the partiality of an individual juror is not a question of mixed law or fact but is a question of historical fact not subject to federal *habeas corpus* review under 28 U.S.C. § 2254(d). *Patton* v. *Yount,* —— U.S. ——, 52 L.W. 4896, 4899 (1984). This Court has also recently held in *Rushen* v. *Spain,* 78 L. Ed. 2d 267, 274, 104 S. Ct. 453 (1983) that a state court determination that a juror's deliberations were not biased by an *ex parte* communication with the judge is also a finding of fact which may be set aside only if it lacks fair support in the record.

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* "A" refers to the appendix of the petitioners' petition.

Similarly, the reason a mistrial is granted (as opposed to whether that reason is an abuse of discretion) is a question of fact, a question which has already been determined by the New York State courts and is therefore binding on this Court. Thus, the only question which this can review is whether manifest necessity properly existed for the declaration of the mistrial.

II.

The Mistrial Was Manifestly Necessary Because the Jury Was Deadlocked.

Retrial after a properly declared mistrial does not violate the double jeopardy clause of the constitution. *Arizona* v. *Washington,* 434 U.S. 497 (1978). The issue here, therefore, is whether the mistrial was properly declared.

If a trial judge discharges a jury prematurely he deprives the defendant of a fair trial; conversely, if he fails to discharge a jury which is unable to reach a verdict after exhausting and protracted deliberations, there is a risk that the verdict will be the result of the coercion inherent in the situation rather than an objective judgment. *Arizona* v. *Washington, supra,* at 509. This judicial tightrope which a judge must traverse requires the exercise of sound discretion which, however, need not be expressed in an explicit finding or explained in full. *Arizona* v. *Washington, supra,* at 516-517. While a trial court's determination of manifest necessity is reviewable by this Court, this finding by the trial court judge must be "accorded great difference". *Arizona* v. *Washington, supra* at 510.

This Court has made it clear long ago that the finding of manifest necessity cannot be based on the simple application of any set formula. *United States* v. *Perez,* 9 *Wheat* (22 U.S.) 579 (1824). Every case of a mistrial turns on its own facts and the courts have never required the trial court to inquire behind an announced deadlock *United States* v. *MacQueen,* 596 F.2d 76, 82 (2d Cir., 1979).*

Therefore, polling of the jury in the instant case was not essential to the finding of manifest necessity. It is important however, that the jury had twice declared itself deadlocked and in the court's opinion they had simply had enough. "I am playing Russian roulette with some other people on the jury . . . from what I have heard, they are literally, just ready to burst out of here."

In the instant case the trial court declared a mistrial at the juncture where, in its discretion, it believed that the deliberations had reached the stage that a verdict could only be the product of coercion and not reasoned judgment. The mistrial was declared after a week of deliberations, two notes that the jury was deadlocked, an *Allen* charge, and a juror reaching the point of a nervous breakdown.**

While the petitioners paint the picture that the mistrial was declared because Ms. Doe became ill, the record is re-

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* In *United States* v. *MacQueen, supra,* at 83 the Second Circuit also held that post-trial affidavits of jurors cannot be considered in determining a double jeopardy claim. The petitioners improperly sought to introduce them before the Second Circuit and now repeats that attempt in the instant petition.

** The petitioners argued before the trial court that Ms. Doe's emotional problem might have been preventing the jury from reaching a verdict. Under the circumstances it was more likely that the strain of three days of deadlock caused Ms. Doe's condition, as well as affecting other jurors.

plete with evidence that the mistrial was declared because the judge believed the jury was at an impasse.

On the final day of deliberations the judge announced that he intended to keep the jury late that night. Then, after Ms. Doe communicated her emotional problem to him, he stated that he had gotten some indication that other jurors were also having problems. Even before the extent of Ms. Doe's problem was known the court remarked, "I am not intending to go much beyond tonight".

In stating (in chambers) that he intended to declare a mistrial, the judge articulated as factors the stress and the deadlock that he perceived: "What occurred, I suspect strongly, is that when they sent that note indicating they were hung, eight-four, they thought that was going to be the end of it". "If we continue, we may have problems with other jurors." Another juror, Ms. McCaffrey, had been crying "and probably other jurors." The court added " . . . from what I have heard they are literally, just ready to burst out of here."

Thus, the trial judge did not abuse his discretion by refusing to substitute an alternate juror for Ms. Doe, as requested by defense counsel. The refusal was not the product of judicial obstinance, rooted in fact that a single juror was ill, but rather because the jury had reached the end of rational deliberations. As the trial court explained to the petitioner's attorneys:

> "You see, we're dealing with two diffecent concepts. One is the right of the defendants' to agree to have an alternate substitute[d]. The next is my discretionary or my duty to discharge the jury after lengthy delib-

> erations at the proper time, and I feel, especially in light of this development, that this jury has had enough."

It is clear, therefore, that petitioners' contention that the court's "main concern" was Ms. Doe's mental health is belied by the record. The court had already decided that the jury was deadlocked and that it would declare a mistrial; it was only after those decisions that the court's concern became how best to deal with Ms. Doe's problems.

Although federal courts have permitted the substitution of alternate jurors after lengthy deliberations, [*see United States* v. *Kopituk,* 690 F.2d 1289 (11th Cir., 1982), U.S. App Pndg], they have also required in those instances that deliberations begin anew. *United States* v. *Phillips,* 664 F.2d 971 (5th Cir., 1981) Even these courts have realized, that the further along deliberations proceed the more difficult it becomes to disregard them and begin anew. *United States* v. *Kopituk, supra.* Most importantly, the instances above did not involve deadlocked juries, and the substitutions were reasonable, even if difficult. In the instant case the jury had already been deadlocked for several days and the court believed substitution of the alternate and renewed deliberations after seven days "would be absolutely absurd."

As the Second Circuit noted in *United States* v. *Goldstein,* 479 F.2d 1061, 1068 (2d Cir. 1973); U.S. *cert. den.* 414 U.S. 873.

> "Requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts."

In that case the court held that the trial judge had not abused discretion in declaring a mistrial where, as in the situation herein, the jury had twice reported that it was unable to reach a verdict.

In the instant case, the United States Court of Appeals for the Second Circuit found that based on the record now before this Court:

> We believe the exercise of the judge's discretion was "sound" under all the circumstances which include the increasingly apparent strain and tension placed on the sequested jury by the lengthy deliberations, the highly charged atmosphere of the case, and the remote likelihood that even a jury untroubled by Ms. Doe's illness would have reached a verdict by the end of the evening (A-41).

This finding by the Second Circuit, which is similar to the decisions of every state and federal court which has reviewed this case, is amply supported by the record and should be sustained.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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